In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 515

RICHARD R. HARSHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–2) is not yet reported. An opinion of the court of appeals in the related *Parker* case, to which the instant opinion refers (Pet. App. 5–11), has also not yet been reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1962 (Pet. App. 1, 3; R. 79, 81). A petition for rehearing was denied on September 14,

[1] A petition for a writ of certiorari has been filed in the *Parker* case, No. 516, this Term. Since the major opinion of the court of appeals was written in that case, we have discussed the common issues there, dealing here only with the matters that are peculiarly applicable to this case.

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1962 (R. 82; Pet. App. 4). The petition for a writ of certiorari was filed on October 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a basis in fact for petitioner's classification in selective service class 1–A–0 (noncombatant service).

2. Whether various rulings by the trial judge were proper.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged that the petitioner, on November 19, 1958, willfully refused to submit to induction into the armed forces of the United States, in violation of 50 U.S.C. App. 462 (R. 2–3). After a jury trial in September 1961, petitioner was convicted and sentenced to imprisonment for thirty months and fined $1,500 (R. 4; 67, 71, 72–73). The conviction was affirmed on appeal (R. 79–80, 81).

The pertinent facts may be summarized as follows:

1. Petitioner is a member of the Harshmanite Church of Sullivan, Illinois, having become a member of that church in 1949 or 1950 when he was about 14 or 15 years of age (G. Ex. B–8).[2] In 1953, petitioner registered for the draft with Local Board No. 177 in Sullivan, Illinois. He subsequently filed a special

[2] We have lodged with the Clerk of this Court the Selective Service File of the petitioner, which was an exhibit at the trial. This will be referred to as "G. Ex. B." and the appropriate document number therein will be referred to by number.

form for conscientious objectors, together with a summary of the history and the tenets of the Harshmanite Church (R. 40–41; G. Exs. B–2, B–4; see G. Ex. B–3). Petitioner indicated that from about June 1952, he had been employed by Community Industries, a business enterprise established by the Harshmanite Church, the chief function of which is to provide employment for members of that Church, and that he was then working as an assembler of piece goods in the dress division of the factory (G. Exs. B–1, B–2). An exhibit to a letter by the pastor of the Harshmanite Church to the local board stated that the Harshmanites "are in fact willing to produce anything needed by the government when it is engaged in carrying on war. We do not feel that doing so makes us responsible for war or the waging of war" (G. Ex. B–4). In September 1953, the local board classified the petitioner 1–A–O, *i.e.*, eligible for non-combatant military service (R. 41; G. Exs. B, B–1). After a personal appearance before the local board, petitioner was again classified 1–A–O (R. 41; G. Exs. B, B–1, B–6, B–8), and, on appeal, the Illinois Appeal Board in August 1954, also classified him 1–A–O (G. Exs. B, B–12).

In 1955, the local board reopened petitioner's classification and reclassified him 1–A–O (G. Ex. B–1). After the petitioner had made a personal appearance before the local board in support of his claim that he should have been classified 1–O (exempt from non-combatant and combatant military training and service), the board again classified him 1–A–O (G. Exs. B–1, B–20, B–26, B–27, B–34; see G. Ex. B–22).

Petitioner then appealed his classification to the Illinois Selective Service Appeal Board.

Pursuant to section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), the Department of Justice investigated petitioner's case for the purpose of making a recommendation to the State Appeal Board. A hearing was held in October 1956, at which the petitioner, the pastor of the Harshmanite Church in Sullivan, and the Treasurer of Community Industries were present. In November 1956, the Department recommended that petitioner be classified 1–A–O since he was working in an industry which was engaged in the manufacture of defense products under government contract. The recommendation recited that the petitioner had worked in the garment division of Community Industries at a time when the company held government contracts to make WAC uniforms, and that the petitioner was presently employed in the candy division of that factory (G. Ex. B–36). The recommendation also recited (G. Ex. B–36):

> The registrant stated that it is not a violation of their Christian duty to manufacture goods for military consumption but that they do not accept the responsibility for actions of persons who use such products. He said, however, that by becoming members of the armed forces they would become responsible for such actions. The registrant verified that the beliefs and opinions of the Harshmanites in general are also his own personal beliefs and opinions.

The Department expressed the view that petitioner had failed to sustain his claim with regard to non-combatant military service.

In a letter to the Appeal Board in December 1956, petitioner claimed that he was entitled to a 1-0 classification on the basis of his religious beliefs, and that the local board had not given "unbiased consideration" to his claim inasmuch as one member of the board had said that there was "no such thing" as a 1-0 classification and the board chairman had indicated that petitioner would have to leave the country in order to obtain a 1-0 classification (G. Ex. B-39). The letter stated (G. Ex. B-39):

> I cannot see how my distinction between participation and non-participation in war can be called untenable. As a civilian I am a free man. As a non-combatant member of the armed forces I am in the Army. It's just that plain. * * *

On May 10, 1957, the Appeal Board classified the petitioner 1-A-0 (G. Exs. B-1, B-34, B-40; see R. 49). The opinion recited (G. Ex. B-40):

> This Appeal Board has noted the memoranda of the local board's actions in determining the classification of this registrant and the Appeal Board does not concur with the conclusions of the local board as stated in such memoranda. This Appeal Board is accordingly ignoring those conclusions of the local board. We note, however, that the registrant and others were allowed complete freedom by the local board and by the Hearing Officer of the Department of Justice to place in the registrant's cover sheet any and all information which the registrant

wished to file in support of his claim of conscientious objection.

We have considered the entire Selective Service file of this registrant as explained above. We have also considered the recommendation of the Department of Justice but are not bound by it. We, the Appeal Board have reached the independent conclusion that this registrant, Mr. Richard R. Harshman, is conscientiously opposed to combat training and service as defined in the law. However, we find that he does not actually conscientiously object to noncombatant service as the law defines it. His classification is therefore determined by this Appeal Board to be 1–A–0.

The local board subsequently ordered the petitioner to report for induction into the armed forces on November 19, 1958 (R. 49; G. Ex. B–60). Petitioner reported to the induction center in Chicago, Illinois, but refused to submit to induction on the grounds that his religious beliefs would not permit him to do so (R. 18–19, 22, 49–50; G. Exs. B–1, B–63; see R. 47–48).

2. At the trial, petitioner's Selective Service file was introduced into evidence, and counsel for the petitioner read related documents in that file to the jury (R. 13–14, 42). The court refused to order the government to produce a copy of the report of the Departmental hearing officer (Brittingham), which was not in petitioner's Selective Service file, and refused to allow the petitioner to offer proof to contradict statements made in the Departmental recommendation to the Appeal Board or to show that Community Industries never manufactured "war goods" (R. 34–35, 43–47, 50–51).

At the conclusion of the trial, petitioner moved for judgment of acquittal on the ground that the testimony failed to show that there was a basis in fact for his 1–A–O classification or for the board's denial of his claim to 1–O classification, and that the Departmental recommendation was based upon untruthful "facts", prejudice, and "possible suspicion" (R. 52). The court denied the motion, holding that there was a basis in fact for petitioner's classification (R. 52).

ARGUMENT

1. As in the *Parker* case (No. 516), where the issues are more fully discussed (see note 1, *supra*), the trial judge properly applied the standards laid down by this Court, and found that there was basis in fact for concluding that he was not actually conscientiously opposed to noncombatant service. Before the Departmental hearing officer, petitioner stated that "it [was] not a violation of their Christian duty to manufacture goods for military consumption but that they do not accept the responsibility for actions of persons who use such products" (see G. Ex. B–36). The Departmental recommendation recited that the petitioner had been employed by Community Industries since July 1951; that he presently works in the Commissary Department of Community Industries; and that that business "held contract[s] to make WAC uniforms" at a time when the petitioner worked in the garment division (G. Ex. B–36). Petitioner did not challenge these admissions at any time during the remainder of the administrative proceedings. Indeed, in his letter to the Appeal Board of December 1956, after he had received a copy of the

Departmental recommendation, he said that he could not understand how his "distinction between participation and non-participation in war [could be] called untenable" (G. Ex. B–39). This information, which appeared in petitioner's Selective Service file, constituted a sufficient basis for his classification.

2. As discussed in the government's brief in No. 516, the trial court properly refused to allow the petitioner to introduce evidence bearing upon his classification or to challenge the Departmental recommendation to the Appeal Board (see Pet. 29–30). Moreover, this record shows, even more clearly than in No. 516, that the alleged statements by board members that they did not believe in the 1–O classification have no bearing on this case. The Appeal Board made clear that it was ignoring the conclusions reached by the local board (G. Ex. B–40). It recited that it had reached the "independent conclusion" that the petitioner did not conscientiously object to noncombatant service and that he was accordingly classified 1–A–O. The *de novo* appeal procedure would have little utility if errors before a local board, which the appeal board recognized and avoided, were deemed to infect the appellate classification.

The contention (Pet. 27–28) that the proceedings before the Appeal Board were a "sham" is without support in the record. Petitioner was afforded full opportunity to present evidence from his Selective Service file. The Appeal Board noted that the petitioner and others were allowed complete freedom by the local board and by the hearing officer of the Department of Justice to place in the cover sheet

any and all information which he wished to file in support of his claim of conscientious objection. It was only after full consideration of his file, together with the Departmental recommendation, that the Appeal Board placed petitioner in class 1-A-O (G. Ex. B-40).

The other claims of procedural error are discussed in the government's brief in No. 516. It should be noted, however, that in this case, although petitioner's Selective Service file was introduced into evidence and counsel for the petitioner read to the jury seven documents from that file (R-38-39, 42), there is nothing in the record to indicate whether the court submitted petitioner's Selective Service file to the jury for consideration (See R. 67). Assuming that the exhibit did go to the jury, petitioner could not, for the reasons discussed in No. 516, have been prejudiced thereby.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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